Supreme Court, U. S.
FILED
SEP 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 79-1914

ELIZABETH ANN HARBOUR,
Petitioner

v.

WILLIAM T. HARBOUR,
Respondent

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO WRIT

CRAWFORD, GRISSOM, CROW
& RICHARDS
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The Respondent has attempted to narrow the issue in this case by asserting that the Petitioner is appealing from an unfavorable finding of fact. The Respondent, in his opposition to writ, has in essence, stated the true problem with the Texas Court of Civil Appeals opinion. A close examination of *In Re Nunnally*, Texas law and Federal law will emphasize the lack of equal protection for Texas residents and those similarly situated.

In existence at the time Petitioner first initiated her action were two (2) statutory enactments. One of the statutes is 11 U.S.C. Section 35(a)(1970), Bankruptcy

Act. Under the Bankruptcy Act, a discharge releases a bankrupt from all of his provable debts. Therein, the statute provides for several exceptions. One of the exceptions, 35(a)(7), provides that alimony due or an obligation for maintenance and support of a wife or child is nondischargeable.

The second applicable statutory enactment is Texas Family Code Ann. 3.63 (1970) wherein it has been interpreted by the courts in Texas to be public policy to prohibit permanent alimony in divorce settlements and decrees. *Francis v. Francis,* 412 S.W.2d 29 (Tex. 1967).

The next consideration is the decision of the Court of Civil Appeals below. The Petitioner respectfully accepts Respondent's statement of the court's judgment that Petitioner failed to meet her burden of proof. Although it is not clear as to what that burden is, the Court of Civil Appeals obviously required the Petitioner to show that the decree of divorce and the marital property settlement provided for alimony and maintenance and support in order for this debt to be non-dischargeable. Here is the confusion referred to in Petitioner's Application for Writ. If Petitioner would show that the property settlement provided for alimony and maintenance and support, the settlement and decree would be void under the Texas Family Code mentioned above. Therefore, the Petitioner and those similarly situated in the State of Texas are left with a divorce decree and property settlement agreement which creates a debt for the Respondent *but* is thereafter discharged when the Respondent files for bankruptcy.

This result is entirely contrary to the spirit and intent of the bankruptcy laws. The exception referred to, 35 (a)(7) was added to the Bankruptcy Act in 1903. Pre-

ceding the effective date of this section, the United States Supreme Court examined the dischargeability of alimony obligations in the case of *Audobon v. Shufeldt,* 181 U.S. 575 (1901). There the Court, with Mr. Justice Gray delivering the opinion of the Court, said:

> "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, expressed or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction."

The intent of Congress in passing the Bankruptcy Act, was *not* to provide for a release of a father from his obligation to support his children and spouse by his discharge in bankruptcy. *Melichar v. Ost,* 445 F.Supp. 1162 (D. Maryland 1977). *Audobon* was followed by *Dunbar v. Dunbar,* 190 U.S. 340 (1902) where, in full realization that the effective date of the alimony exception was approaching, the Court indicated that the exception paves the way for a legislative trend in the direction of non-discharging an obligation of the bankrupt for the support of his wife and children. Additionally, as presented by Petitioner in her Application for Writ, *In Re Nunnally,* has interpreted Texas law to be that if a substance of a debt amounts to alimony or for maintenance and support, the debt would fall within the alimony exception and therefore be non-dischargeable. Therefore, Petitioner would respectfully submit that upon considering the legislative intent of the bankruptcy law, as interpreted by the United States Supreme Court, and in light of the *Nunnally* decision, the failure of the trial court to find that the

Respondent's debt to his spouse and children was non-dischargeable as a matter of law was clearly error, effectively denying Petitioner's right to equal protection.

It is appropriate, at this time, to point out to this Honorable Court an additional indication of the legislative intent of Congress. This is referenced by the new Bankruptcy Code, 11 U.S.C. 101 et. seq. (1979). In an attempt to alleviate the confusion mentioned above, the Congress provided specifically that a debt to a spouse in connection with a separation agreement is non-dischargeable.

Furthermore, Petitioner would show to this Court that if the conclusion of the Respondent is accepted and *Nunnally* does require a fact finding, Petitioner would submit that no finding of fact was made by the trial judge despite the efforts of Petitioner to obtain a full hearing on all of the facts in the presence of a jury. The trial court's decision came only after both parties argued before the Court and submitted briefs. The trial court totally ignored *Nunnally* and ruled, as a matter of law, that Respondent's obligation of support for Petitioner was discharged.

The Petitioner would respectfully submit to this Court that a truly important constitutional question of equal protection to the citizens of the State of Texas exist in light of the conflict between the bankruptcy laws and Texas public policy prohibiting alimony. The necessity for a clarification by this Court is essential in the development of Federal Bankruptcy law as it relates to Texas decrees of divorce.

Respectfully submitted,

CRAWFORD, GRISSOM, CROW
& RICHARDS

STANLEY W. CRAWFORD
3700 Montrose
Houston, Texas 77006
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Stanley W. Crawford, the attorney for the Appellant, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ day of September, 1980, I served copies of the foregoing Petitioner's Reply to Respondent's Opposition to Writ upon Robert C. Floyd, counsel for the Respondent.

STANLEY W. CRAWFORD
Counsel for Petitioner

APPENDIX A

Federal Statute Involved

Bankruptcy Act 11 U.S.C. § 523:

A discharge under section 727, 1141 or 1328(b) of this title does not discharge an individual debtor from any debt—

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, . . .

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File & Fee Docket Courts Harris County

No. 854633

Court COURT OF DOMESTIC RELATIONS #4

WILLIAM T. HARBOUR, SR.
vs.
ELIZABETH ANNE HARBOUR

Pltf. Atty. Miller, Gann, & Perdue

Deft. Atty.

Filed DEC 1 1970

Transferred

Action For DIVORCE

Costs Paid By:

Charges Paid By

(MOTION) 3-27-72 DW 3-23-72 SB

Jury Fee	10/21/71	5.00	HERBERT L. COFFMAN
Stenographer Fee		5.00	

DIVORCE

Clerk's Fee:	
Filing	$15.00
Issuing Citation & 1 Copy	4.00
Certificate-BVS	1.00
Child Support	3.00
Law Library	2.50
Sheriff's Jury Fee	.50
Sheriff / Constable Service on Citation	4.00
Total Paid	$30.00
Additional Fees	

AUDITED 1970 FULLERTON, County Auditor

2.00 12-3-71 Herbert L. Coffman

CLERK SUBP 1.27 SHERIFF

CLERK - MOTION - 10.00 12-8-71 SHERIFF - SUBP 1.27 GREEVES

Depo: Toby Gillis 145.40 Pltf. Atty.

CLERK - Motion to Reduce C/S 4.00 12-29-71

SHERIFF 4.00 Pltf. Atty.

Depo: Dr. Frank Rose 38.00 Pltf. Herbert Coffman

Depo: Neal Nelson 45.00 Pltf.

Subpoena: Dr. Daniel Jackson 30.00 Pltf. Herbert Coffman

Subpoena: ELIZABETH ANNE HARBOUR 29.00 Pltf. - MILLER, GANN & PERDUE

Subpoena: CHERYL DAURICH - 27.00 Pltf.

Depo: BEVERLY WHEELER - 39.00 Pltf.

Depo: RACHEL MURPHY - 58.50 Pltf.

Depo: CHERYL DAURICH - 28.25 Deft.

Depo: NEAL M. NELSON - 31.25 Pltf. - MILLER, GANN & PERDUE

Depo: RHONDA WEXLER - 43.00 Pltf.

Depo: DR. DAVID LITOWSKY - 40.00 Pltf.

HERBERT L. COFFMAN) ABSTRACT - 4/4/72 - 2.00 MILLER, GANN & PERDUE

DEPO: MERILYN STINSON - 118.25 Pltf. - MILLER, GANN & PERDUE

CLERK SUBP 4117	11.00	12-31-71	12-8-70	10.00	CASH
SHERIFF	12.00	12-31-71	12-29-71	GOV	CASH
CLERK SUBP	10.00	12-3-71	12-1-71	29.00	CASH
SHERIFF	36.00	12-3-71	12-2-71	46.00	CASH
CLERK SUBP	1.00	12-7-71	12-3-71	1.00	CASH
Depo: Elizabeth Ann Harbour 1st	292.50	Pltf Herbert Coffman	12-7-71	1.00	CASH
Depo: Tom Brack	63.80	Pltf Herbert Coffman	12-22-71	10.00	CASH
Depo: Robert A Hauser	221.00	Pltf Herbert Coffman	12-22-71	10.00	CASH Sec 8 Supplemental Hearing
Depo: Dr William T. Harbour Sr.	68.75	Deft Fred Rottinger			
Depo: William T. Harbour	306.45	Deft			
Depo: Elizabeth Ann Harbour	230.00	Pltf Atty			
CLERK SUBP	1.00	12-7-71			
Depos: Frank Wexler 1260 pltf. Herbert Coffman - Casper Robinson Compton 99.40 pltf. Herbert Coffman					

Refund Plaintiff's Use

Service 12-3-70 ELIZABETH ANNE HARBOUR (CT)
3-5-71 - Elizabeth Anne Harbour (CT) Except

Judgment For Granted 854/147 12-6-71 3-17-72

Signed R. HICKEY, JR. Herbert L. Coffman given to produce, etc. dismissed

Motion for New Trial Overruled 803/810 4-6-72

Appeal

Execution - DOC. 61 Page 34 Issued 1-19-72

Remarks: Costs to be paid by E.P.O: Herbert L. Coffman (Steno Fee 5.00) Deft

Miller, Gann & Perdue Atty. - W/C

Ref'd Ltr. 3-23-72

APPENDIX B

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